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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1944

No. 264 38

IN THE MATTER OF ROBERT MICHAEL, A GRAND JURY.

WITNESS,

*Petitioner.*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT  
THEREOF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 964

IN THE MATTER OF ROBERT MICHAEL, A GRAND JURY

WITNESS,

Petitioner

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

*To the Honorable, the Chief Justice and Associate Justices  
of the United States:*

Robert Michael, a citizen of the United States, petitioner in the above entitled matter, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Third Circuit entered December 16, 1944, one Judge dissenting (R. 129-40), affirming the judgment of the District Court of the United States for the Middle District of Pennsylvania, entered September 22, 1944, convicting the petitioner of criminal contempt.

**I. Summary Statement of Matter Involved**

This was a proceeding to hold Robert Michael, the petitioner herein, in contempt before Hon. William F. Smith, United States District Court Judge, District of New Jersey.

specially presiding in the United States District Court for the Middle District of Pennsylvania.

On September 14, 1944, a special assistant to the Attorney General of the United States presented a petition asking the District Court to issue an order on petitioner to show cause why he should not be held in contempt of court, on the ground that he was a contumacious, perjurious and evasive witness before a Grand Jury then in session in the District Court for the Middle District of Pennsylvania (R. 3).

The court, on presentation of the petition, granted an order on petitioner to appear in court and show cause why he should not be held in contempt (R. 9). Petitioner's counsel filed a petition asking for a rule on Government counsel to furnish a bill of particulars (R. 10). The court denied the petition for a bill of particulars (R. 12).

On September 20, 1944, pursuant to the order of court, petitioner appeared in court with counsel, who presented a motion to quash the order to show cause and to dismiss the proceedings (R. 13). The court denied the motion (R. 14), and thereupon answer was filed on behalf of petitioner (R. 14).

The Government then proceeded to trial and presented testimony for the purpose of proving perjury on the part of petitioner.

On September 22, 1944, after the Government rested its case and after denial of petitioner's motion to quash and to dismiss the proceedings (R. 94), the District Court announced that it found the petitioner guilty of contempt of court. After a motion in arrest of judgment was made and denied, the court sentenced Robert Michael, the petitioner, to a term of six months in prison. Pursuant to judgment and order of commitment (R. 92), petitioner was committed to the Lackawanna County Jail, Scranton,

Pennsylvania. An appeal from the judgment of the District Court was allowed by the United States Circuit Court of Appeals for the Third Circuit( and on October 2, 1944, petitioner was released on bail pending appeal.

The Circuit Court of Appeals, on December 16, 1944, rendered an opinion (R. 129), in which two judges affirmed the judgment of the lower court, concluding that although there was no evidence that petitioner was contumacious or obstreperous and that his testimony cannot fairly be characterized as unresponsive, petitioner's rights were not disregarded and that he could have not only been found guilty of perjury but that such conduct on his part was an obstruction to the administration of justice and that he could be and was held liable for contempt.

The dissenting opinion (R. 134), although agreeing with the majority concerning certain procedural features in the case, disagreed as to the conclusion reached by the majority of the court and stated strongly that the evidence before the District Court did not warrant the trial judge in holding petitioner in contempt of court. The dissenting judge stated that "the use of this drastic power wherein a judge sits as an accuser, trier of the fact, and dispenser of punishment, should only be exercised, when the obstruction to the performance of judicial duty is clearly shown." He further held that no such obstruction was shown in the instant case.

## **II. Basis of Jurisdiction**

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938. The opinion of the Circuit Court of Appeals for the Third Circuit was entered December 16, 1944. On December 26, 1944, the Circuit Court of Appeals stayed the mandate for thirty days from December 31, 1944, pending petitioner's application for a writ of certiorari.

### III. Questions Presented

1. Is not a witness before a Federal Grand Jury, who is charged with perjury as a basis for criminal contempt of court, entitled to his constitutional protection to have his guilt or innocence decided by a jury of his peers upon indictment for perjury?

2. May a witness before a Federal Grand Jury be adjudged in contempt of court on the ground that he committed perjury before the Grand Jury where there is no evidence of obstruction of justice other than that inherent in the perjury itself?

3. May a witness before a Federal Grand Jury be adjudged guilty of contempt of court for perjury alone allegedly committed before the Grand Jury?

4. May a witness called before a Federal Grand Jury be adjudged guilty of contempt of court where the judgment of the trial court contains no formal finding that he was guilty beyond a reasonable doubt?

5. Can a judgment of criminal contempt be sustained where the defendant is charged originally with having given obstructive, evasive, perjurious and contumacious answers to the questions propounded to him before a Grand Jury, where the trial judge finds the defendant guilty only of perjury and evasiveness, and the Circuit Court of Appeals, on review, finds that there was no evasiveness, contumacy or obstreperousness?

6. May a defendant in a criminal proceeding be deprived of his constitutional right of trial by jury on the charge of perjury, under the guise of a summary hearing on the charge of contempt of court?



#### IV. Reasons for Granting the Writ

1. In sustaining the judgment of the District Court adjudging Robert Michael, the petitioner, guilty of criminal contempt, the Circuit Court of Appeals—

(a) has denied to the accused charged with perjury his constitutional guarantee to have the charge presented by indictment and his innocence or guilt tried by a jury of his peers;

(b) has, on a basic accusation of perjury, held that the obstruction of justice inherent in perjury is alone sufficient to sustain a commitment for criminal contempt of court;

(c) has departed from the principle that a judgment of conviction in a criminal case must recite a formal finding of guilty beyond a reasonable doubt; and

(d) has decided an important question of Federal law, enlarging the field of judicial power in criminal contempt cases beyond the limitations defined by the Supreme Court of the United States.

#### Prayer

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the

decision of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may be proper.

January 15, 1945.

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# **BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

## **I**

### **Opinions Below**

The judgment of the United States District Court for the Middle District of Pennsylvania, convicting the petitioner of criminal contempt (R. 92) is not reported. The opinion of the United States Circuit Court of Appeals for the Third Circuit dated December 16, 1944, is not as yet officially reported (R. 129-41).

## **II**

### **Jurisdiction of This Court**

The decision of the Circuit Court of Appeals for the Third Circuit was filed December 16, 1944 (R. 129) and on December 26, 1944, the order of mandate was stayed by the Circuit Court for thirty days from December 31, 1944, pending petitioner's application for a writ of certiorari. Jurisdiction of this Court is invoked under Judicial Code Section 240 (a), 28 U. S. C. A. Section 347 (a), as amended by the Act of February 13, 1925.

## **III**

### **Statement of the Case**

Petitioner seeks to review the judgment of the Circuit Court of Appeals for the Third Circuit, filed December 16, 1944, affirming the judgment and sentence entered in the United States District Court for the Middle District of Pennsylvania on September 22, 1944, after a hearing before the Honorable William F. Smith, D. J.

The facts have been set forth in the foregoing petition (p. 2) and will not be repeated.

## IV

**Specification of Errors to be Urged**

The Circuit Court of Appeals for the Third Circuit erred:

1. In failing to find that the constitutional right of trial by jury on the charge of perjury was denied to the petitioner;
2. In finding that the obstruction of justice inherent in the perjury alone was sufficient to warrant the conviction for contempt;
3. In finding that there was any obstruction of justice other than that inherent in the perjury itself;
4. In sustaining a conviction for contempt of court when the judgment of the lower court did not contain a finding of guilt beyond a reasonable doubt;
5. In affirming the judgment of the lower court based upon admissions of incompetent evidence; and
6. In affirming the judgment of the District Court.

## V

**Argument.**

(1)

*The petitioner was denied his constitutional right of trial by jury.*

The jurisdiction of the District Court to try the defendant on a charge embodied in the petition for citation to hold for contempt was challenged in the District Court by (a) a motion to quash (R. 13); (b) the answer to the petition (R. 14); (c) a motion to dismiss the proceedings (R. 91); and (d) a motion in arrest of judgment.

The question of the jurisdiction of the District Court was raised on appeal to the Circuit Court of Appeals under the statement of the first question involved in that appeal. The majority opinion in the Circuit Court of Appeals contented itself in disposing of this important question as follows:

"For the purpose of the remainder of this discussion we shall assume the answers are untrue and that the accused might have been found guilty of perjury. May he likewise be found guilty of contempt of court and summarily punished accordingly or is he subject to prosecution for perjury only, in which he would be entitled to the Constitutional protection of trial by jury?"

The question is nowhere answered in the opinion of the majority until we get to the final paragraph of the opinion:

"The point is not free from difficulty. We have considered it carefully with full recognition of the importance of the constitutional provision for a jury trial of a person charged with crime. Our conclusion is that the appellant's rights were not disregarded, that he could have not only been found guilty of giving untrue testimony but that such conduct on his part was an obstruction of the administration of justice and that he could be and was properly held liable in the contempt proceedings."

We submit that this is not an answer to the question propounded to itself by the Circuit Court of Appeals and does not dispose properly or adequately of the important question here involved, to wit, the right of the defendant to be tried by a jury of his peers as guaranteed by the Constitution of the United States. The true situation presented here is reflected in the dissenting opinion in the Circuit Court of Appeals, where we find the following language:

"It seems to me that a careful study of the testimony given before the Grand Jury in the instant case is no-

wise measures up to the conduct of the defendants in any of the cases herein cited. He was not contumacious, he was not obstreperous; his answers were responsive, and while as I have indicated, I do not feel he was telling the truth at all times, I cannot possibly see where any of his answers, aside from being possibly perjurious, tended in anywise to block the inquiry. At most his guilt or innocence should be decided by a trial upon indictment for perjury.

"The use of this drastic power wherein a judge sits as accuser, trier of the fact, and dispenser of punishment, should only be exercised, when the obstruction to the performance of judicial duty is clearly shown."

For this statement in the minority opinion, there is ample support in *Ex Parte Hudgings*, 249 U. S. 378, 383.

(2)

*The Circuit Court of Appeals was in error in sustaining the conviction for contempt of court based only on an obstruction of justice inherent in perjury.*

The latest deliverence on this subject by the Supreme Court of the United States is in the case of *Clark v. U. S.*, 289 U. S. 1, where Justice Cardozo, speaking for the Court, said:

"Perjury by a witness has been thought to be not enough where the obstruction to judicial power is only that inherent in the wrong of testifying falsely."

In the same case, in the opinion, citing *Ex parte Hudgings*, *supra*, Justice Cardozo added:

"For offenses of that order the remedy by indictment is appropriate and adequate."

(3)

*The Circuit Court of Appeals erroneously found there was an obstruction to justice other than that inherent in the perjury itself.*

The only indication of substantive obstruction of justice discussed by the majority in its opinion is that in connection with six checks executed by the petitioner as trustee in reorganization proceedings. The witness did not deny knowledge of the checks but stated that he could not recall the purpose for which the checks were signed by him. The Court assumed that there was a false explanation of the checks. There was no explanation of the checks and the witness' explanation of his inability to tell what the checks were for consisted of his testimony that these may or may not have been a part of a batch of one hundred and fifty checks, which number of checks he at times signed in one day. The minority opinion, treating the same subject, states definitely that there was not any evidence tending to block the Court's inquiry or obstruct the functions of the Court in its investigation, since he, with the majority of the court, found that those same answers were not contumacious nor evasive nor artfully or designedly made, nor could they in any way mislead or have a tendency to forestall the inquiry, and at most, if untrue, amounted only to perjury. We respectfully submit that a citizen's liberties should not be taken from him on such meager findings as expressed in the majority opinion, particularly in view of the fact that the question pertaining to the six checks was put to the petitioner as a witness before the Grand Jury approximately two and one-half years after the checks had been signed and without giving to the petitioner access to a file which might have aided him in further explanation. As pointed out by the minority opinion, there wasn't any

one of the cases relied upon by the majority which had a similarity or applicability of facts.

(4)

*The formal judgment of the District Court did not contain a finding of guilt beyond a reasonable doubt.*

After hearing the testimony in open court, the trial judge stated that he was satisfied beyond a reasonable doubt that the petitioner here was guilty of evasiveness and perjury before a Grand Jury (R. 116). On the same day, the District Court handed down a formal judgment and order of commitment in which there is no finding of guilt beyond a reasonable doubt (R. 92). The Circuit Court dismissed the position of the petitioner by finding that there need not be a formal writing that there was a finding of guilt beyond reasonable doubt. Our position here is that the formal judgment and order of commitment upon which this petitioner was deprived of his liberty is the matter to which we must look to justify the Court's sentence. "Criminal contempts are crimes and the accused is entitled to the benefit of all of the Constitution's safeguards and cannot be convicted except by proof beyond a reasonable doubt".

*U. S. v. Goldman*, 277 U. S. 229.

In *U. S. v. Hark*, 320 U. S. 531, Mr. Justice Roberts, for the Supreme Court of the United States, held:

"Where \* \* \* a formal judgment is signed by the judge, this is prima facie the decision of judgment rather than a statement in an opinion or a docket entry."

We respectfully submit that the sentence of the defendant in this formal judgment, wherein there is no finding of guilt beyond a reasonable doubt, is totally void and should be reversed and the defendant discharged.



(5)

*The Circuit Court of Appeals erred in sustaining the judgment of the lower court, which was based upon admission of incompetent evidence.*

The lower court, over objection of counsel for the petitioner, received in evidence conversations had between persons not in the presence of the petitioner and the contents of which had never been communicated to petitioner. The trial judge, over the objection of counsel for the petitioner, received in evidence letters written by other persons and delivered to other persons when the writing of the letters and the contents of the letters were admittedly unknown to and unseen by the petitioner. The Circuit Court of Appeals tacitly admitted that the receipt of this evidence was in error, but justified the receipt of the evidence on the ground that it (the Circuit Court) "had every confidence in his (trial judge) ability and desire to weed out relevant from the irrelevant when it came to determining the weight of testimony against the accused."

We respectfully submit that the testimony was not objected to on the ground that it was irrelevant. It was objected to on the ground that it was incompetent and properly should not have become part of the record. The trier, in fact, should not have had access to it, even though the case was tried without a jury. The trial judge, as a human being, suffers from the frailty of the human, and could not erase from his mind the impression of guilt that this improperly received evidence must have created in his mind, and so we submit that the judgment entered by him must have been influenced by this incompetent evidence to the great prejudice of the petitioner.

(6)

*The Circuit Court has decided an important question of Federal Law enlarging the field of judicial power in criminal contempt cases beyond the limitations defined by this Court.*

The conviction and sentence of the petitioner under the circumstances of this case are, we believe, so unusual that no authority for them can be found in the decisions of the Supreme Court of the United States or the decisions of the highest courts of any of the several States. The procedure followed in the trial court below and concurred in by the Circuit Court, is an outstanding example of the denial to the petitioner of "due process of law". We wish to urge that such procedure is an innovation in American jurisprudence and if it is not promptly rejected by the highest courts, it will have, we believe, a pernicious effect on the administration of justice. If trial courts can do what the District Court did in this case, it will mean that while all persons charged with the commission of crime are guaranteed by the Sixth Amendment to the Constitution, the right to trial by jury, those individuals charged with the crime, perjury, are not entitled to a jury trial but may be tried, convicted and sentenced by a judge. We think all courts should say, as Judge Hand said in *U. S. v. Appel*, 211 Fed. Rep. 495, "This power (of summary conviction for contempt of court) must not be used to punish perjury." (Parenthesis supplied.)

The provisions of the Constitution cannot be evaded by alleging that a witness' testimony before a Grand Jury was perjury and that this perjury was a contempt of court for which the witness could be tried without a jury by a judge who did not hear the testimony, and convicted by that judge and sent to prison.

We respectfully submit that the action of the trial judge under the circumstances of this case is without precedent and if his action is sustained as a lawful exercise of judicial power, every witness who appears before a Grand Jury, or who testifies in any civil or criminal case, incurs the risk of having the trial judge of that court scan his testimony, and after taking the evidence of a few persons, or possibly of none, adjudge that witness guilty of perjury and, therefore, of contempt of court, and on a summary proceeding then imprison him. We feel that if this judgment is sustained, it will constitute a most serious breach of a sacred right guaranteed to a defendant by the Constitution.

### Conclusion

It is respectfully submitted that for the reasons stated, this Petition for a writ of Certiorari should be granted.

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